No.82-1950

In The
Supreme Court Of The United States

October Term, 1982

THE CHURCH OF CHRIST OF
COLLINSVILLE, OKLAHOMA,
a non-profit corporation,
ALLEN CASH, TED MOODY, RON WITTEN
and RICHARD FOX,
Petitioners,

v.

THE HONORABLE TONY GRAHAM,
DISTRICT JUDGE OF THE
FOURTEENTH JUDICIAL DISTRICT
OF THE STATE OF OKLAHOMA,
and MARIAN GUINN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF AGRUMENT

Petitioners come to this Court after a denial by the Supreme Court of Oklahoma of Petitioners' Application to Assume Original Jurisdiction and Petition for Writ of Prohibition.

The denial of Petitioners' Application in the Oklahoma Supreme Court was not a determination on the merits of Petitioners' arguments; nor did it foreclose the re-urging of such arguments on appeal.

The denials of Petitioners' Demurrer, Objection to Subject Matter Jurisdiction and Motion for Summary Judgment are interlocutory orders of the trial court. They may be modified at any time prior to final judgment in the trial court. Only after such final judgment in the trial court are Petitioners entitled to a review of the orders in the Oklahoma Supreme Court. No Oklahoma court has made any final determination of the matters now brought before the Court and this Court has no jurisdiction to grant a Writ of Certiorari.

ARGUMENT

PROPOSITION I:
THE DENIAL OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND

DENIAL OF THE TRUTH DEFENSE ARE NOT FINAL ORDERS WHICH CAN BE REVIEWED BY THIS COURT.

Petitioners filed with the District Court of Tulsa County, Oklahoma, an Objection to Subject Matter Jurisdiction and Motion for Summary Judgment which were overruled on October 15, 1982, with exception allowed to the Defendant.

The Petitioners subsequently filed with the Supreme Court of the State of Oklahoma an Application to Assume Original Jurisdiction and a Petition for a Writ of Prohibition. The Application was denied on March 1, 1983.

The Petitioners subsequently filed a Motion to Reconsider Defendants' Demurrer and Objection to Jurisdiction, and Motion for Summary Judgment with the District Court of Tulsa County, Oklahoma, which was overruled on June 2, 1983. (See Appendix.)

Respondents submit that the denial by the trial court of Petitioners' defense of truth and the denial for Motion of Summary Judgment do not constitute "final judgments or decrees rendered by the highest court" of the State of Oklahoma. Nor does the denial of the Supreme Court of Oklahoma, in its discretion, of the Application to Assume Original Jurisdiction constitute such judgment or decree.

In Oklahoma the denial of a Motion for Summary Judgment is an interlocutory order which may not be appealed. *Rowan v. Rowan,* 523 P.2d 1068 (Okl. 1974). Also, the overruling of Demurrer does not constitute a final judgment. See *Rowan, supra.* The ruling that truth is not a defense is in the nature of a "partial summary judgment" which has been held by the Oklahoma Court not to be a "final order." *Reams v. Tulsa Cable Television, Inc.,* 604 P.2d 373 (Okl. 1979).

In each of the three rulings of the District Court of Tulsa County, Oklahoma, mentioned above no determination has been made by the Supreme Court of Oklahoma as to the correctness of such decision. The District Court of Tulsa County, Oklahoma, retains at all times until a final judgment is rendered in the cause the right to reconsider its view and change its decision. See *Beck v. Bacone College,* 604 P.2d 876, 877 (Okl. App. 1980). Indeed, Petitioners relied upon the *Beck* case in moving the trial court to reconsider its earlier rulings. The Court granted the Motion to Reconsider but denied Petitioners Motion on their merits. In other words, not only has the Oklahoma Supreme Court not rendered a final decision on the matters sought to be reviewed in this Court, but the District Court has not rendered a final decision which it itself cannot change.

The case of *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), reaffirms the general rule that this Court has appellate jurisdiction with respect to state litigation only after the highest Court in which judgment can be had has rendered a final judgment or decree. 420 U.S. at 476-477. Although the Court sets out four exceptions to the rule, none of the exceptions applies in the instant action. First, there has been no conclusive determination of a Federal issue in the instant action which determines the outcome of further proceedings. Indeed, there has been no issue conclusively decided in this action at all. The decisions rendered so far can be reversed by the trial court itself. The Supreme Court of Oklahoma has yet to hear the merits of any claim involved in this law suit. Second, no Federal issue has been finally decided by the highest Court of the state which decision will survive the outcome of further State Court proceedings. Third, no Federal claim has been finally decided where review cannot later be had. The denial of the Application to Assume Original Jurisdiction in no way precluded the right of the Petitioners to raise its arguments in the Motion for Summary Judgment and Demurrer as well as its truth defense on appeal. Indeed, the law in Oklahoma on the granting of the Writ of Prohibition is that same will not be granted when an appeal is an adequate remedy. *Short v. Dunn,* 67

P.2d 18 (Okl. 1977); *Watchorn Basin Association v. Oklahoma Gas & Electric,* 525 P.2d 1357 (Okl. 1974). Finally, no Federal issue has been decided in the highest Court of the State of Oklahoma, which, if incorrect, would preclude all further litigation involved herein. The issue at stake is the extent to which Petitioners have the right to invade the privacy of Respondent, Marian Guinn, both before and after she ceased membership in the Church. If this Court were to decide the issues of law differently from the District Court of Tulsa County, Oklahoma, that law would still need to be applied to the facts of the case herein which could only be done in the District Court on the record made there. In summary, none of the exceptions to the finality rule apply in the instant action.

The overruling of Petitioners' Demurrer and the denial of the truth defense are interlocutory orders reviewable by both the District Court of Tulsa County and the Supreme Court of Oklahoma and do not constitute final orders ripe for review in this Court. For these reasons the Petition for a Writ Certiorari should be denied.

PROPOSITION II:
THE DENIAL OF THE APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION DOES NOT CONSTITUTE A FINAL JUDGMENT OR DECREE OF THE

HIGHEST COURT OF THE STATE OF OKLAHOMA.

When a proceeding is filed before the Supreme Court of Oklahoma on a Application to Assume Jurisdiction and Petition for Writ of Prohibition, the Supreme Court of Oklahoma can react in three ways. The Court can assume original jurisdiction and grant a writ as requested. This entails taking jurisdiction of the matter and hearing the Petition on its merits and coming to a conclusion as to the validity of the Petition for Writ of Prohibition. Second, the Supreme Court could assume original jurisdiction and deny the Writ of Prohibition. Such again would be a determination of the merits of the appeal, determining that the arguments of the Petitioners are without merit. Finally, the Supreme Court can deny the assumption of original jurisdiction. In such a case, the effect is as though no determination had been made by the Supreme Court of Oklahoma. The case remains in the trial court for further proceedings. There is no preclusion of the right to raise the issue in an appeal. The assumption of original jurisdiction is a matter discretionary with the Supreme Court of Oklahoma. *Rey v. Means,* 575 P.2d 116 (Okl. 1978); *Looney v. Election Board of Seminole County,* 293 P. 1056 (1931). The failure of the Supreme Court of Oklahoma to assume jurisdiction in this case does not bar the appeal of the issues decided in the trial court once a

"final order" has been entered in the case pursuant to 12 O.S. §952.

Although prohibition is generally a proper means to seek redress when a trial court exceeds its jurisdiction, that is only granted when an inferior court is "usurping or exercising unauthorized jurisdiction." It does not lie to prevent an inferior court from erroneously exercising jurisdiction, but only to prohibit proceedings in which the lower court is wholly without jurisdiction or threatens to act in excess of its jurisdiction. *Lawhorn v. Robertson,* 266 P.2d 1008 (Okl. Cr. 1954). In the instant case there is a fine line between the rights of the Petitioners and the rights of Respondent Guinn. If the trial court has drawn that line in the wrong place, the question is not one of usurping jurisdiction, but only a mere error of law which should be remedied by appeal and not prohibition. See *Short v. Dunn, supra.*

Petitioners admit that Respondent Guinn had the right to withdraw herself from their society. This makes moot the argument that the matters herein are purely ecclesiastical which may not be reviewed by a Civil Court. The theory behind granting ecclesiastical courts independence in their sphere is that the party to the ecclesiastical court has submitted herself to its jurisdiction by being and remaining a member thereof. However, when that person withdraws from the society

and removes herself from the jurisdiction of that Court, the issue is not purely ecclesiastical. In other words, the jurisdiction does not abide solely in an ecclesiastical court. The jurisdiction becomes one for a civil court. The Oklahoma Supreme Court thus properly denied Petitioners' Application to Assume Original Jurisdiction. Petitioners may re-urge their arguments on appeal.

CONCLUSION

Because there is jurisdiction for the trial court to hear this matter and because the Supreme Court of Oklahoma has rendered no final decision upon the jurisdiction of the trial court or upon the trial court's determination of the rules of law to be applied in this case, this Court lacks jurisdiction to hear same at this stage of the proceedings, and this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,
FRASIER, FRASIER & GULLEKSON

By: Thomas Dee Frasier

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CERTIFICATE OF SERVICE

I, the undersigned, Thomas Dee Frasier, of lawful age being first duly sworn, upon my oath state: That 40 copies of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari were duly deposited in the United States mail, first class postage prepaid, at Tulsa, Oklahoma, this 30th day of June, 1983, and within the time allowed for filing and pursuant to Rule 28 of the Rules of the Supreme Court properly addressed as follows:

Clerk of the Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

The undersigned further states that three copies of said Respondent's Brief in Opposition to Petition for Writ of Certiorari were duly served on each of the following-named persons by depositing said copies in the United State mail, first class postage prepaid thereon, at Tulsa, Oklahoma, this 30th day of June, 1983, addressed as follows:

Charles S. Chapel
502 West Sixth Street
Tulsa, Oklahoma 74119
Attorney for Petitioners

The Honorable Tony Graham
Tulsa County Courthouse
Tulsa, Oklahoma 74103

Thomas Dee Frasier
THOMAS DEE FRASIER

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 30th day of June, 1983.

Sue Ann Smith
NOTARY PUBLIC

My Commission
Expires

June, 1984

APPENDIX

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

MARIAN GUINN Plaintiff, vs. THE CHURCH OF CHRIST OF COLLINSVILLE, OKLAHOMA, a non-profit corporation; ALLEN CASH, TED MOODY, RON WITTEN, and RICHARD FOX, Defendants.	)	No. CT-81-929

DISTRICT COURT
FILED
JUN 15 1983
DORIS AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

ORDER

COMES NOW the Court on this Second day of June, 1983, this matter coming on for Hearing on the Defendants' Motion to Reconsider. Plaintiff being present by and through her attorney, Steven R. Hickman, Defendants' being present by and through their attorneys, Truman B. Rucker, Jr. and Donald M. Bingham. The Court having examined the Motions, accompanying Briefs, Pleadings and other documents of record, and after having heard oral arguments does find that the Defendants' Motion to Reconsider is granted, and further, that Defendants' Demurrer, Objection to Jurisdiction, and Motion for Summary Judgment should be overruled and the previous decisions of Judge William Means in this matter affirmed. Exception allowed. Court further finds that the parties shall have until August 15, 1983, to complete discovery in this matter, and that the Plaintiff, Marian Guinn, shall have ten days from this date to amend her Second Cause of Action if she wishes to include any other allegations.

It is therefore ordered, adjudged and decreed that the Defendants' Motion to Reconsider is granted and all underlying Motions overruled and affirmed in accordance with Judge Means previous rulings, that discovery be completed by August 15, 1983, and that the Plaintiff be given ten days to amend her Second Cause of Action.

TONY M. GRAHAM
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

Steven Hickman
Attorney for the Plaintiff

Truman B. Rucker, Jr.
Attorney for the Defendants

Donald M. Bingham
Attorney for the Defendants